No. 96-792

In The

Supreme Court of the United States

October Term, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE GOVERNMENT OF GUAM, AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should a prosecutor be subject to civil liability for matters contained in an affidavit that she filed in court as part of the initiation of a prosecution, in light of the common-law immunity for alleged defamation in court proceedings and in light of the critical policy need to insulate key actors in the judicial process from the distorting effect of potential personal liability?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioner.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The outcome of this case will have a significant impact on the amici States' ability to ensure that their criminal prosecutors are not hindered in the vigorous enforcement of the criminal laws. All of the concerns that underlay this Court's recognition of prosecutorial immunity in *Imbler v. Pachtman*, 424 U.S. 409 (1976)--the importance of independent prosecutorial judgment unfettered by concerns for personal liability; the high potential for harassing and vengeful litigation; the diversion of resources and time needed to defend such actions--are self-evidently concerns of the States, which of course have primary responsibility for the enforcement of the criminal law and protection of their citizens.

A secondary, but no less real, concern is the impact that this decision could have on the capacity of States and their Attorneys General's offices to manage the explosion of civil litigation that could result from theoretically permitting any acquitted, nol prossed, or otherwise unconvicted criminal defendant from stating a claim for prosecutorial liability. If the Court were to affirm the decision of the Ninth Circuit, the workable concept of *Imbler*--protection of prosecutorial functions "intimately associated with the judicial phase of the criminal process," *id.* at 430--would be left in shambles, and prosecutors would be at a loss to know which, if any, of their functions other than the act of filing charges and the actual trial of the criminal case are immunized. Thus, the States have an interest in urging the Court to take the opportunity that this case presents to affirm that, at a minimum, those prosecutorial acts that occur in connection with and after the filing of charges are virtually always associated with the judicial phase of the criminal process and should therefore be absolutely immune, except in the extraordinary case.

STATEMENT OF THE CASE

The Respondent, Rodney Fletcher, filed this damages action under 42 U.S.C. § 1983 against Petitioner, Lynne Kalina, a Deputy Prosecuting Attorney for King County, Washington,

alleging violations of his Fourth and Fourteenth Amendment rights under the United States Constitution. The essence of Fletcher's complaint was that Kalina had filed an affidavit in support of an arrest warrant that contained facts that Kalina knew or should have known to be false. *See Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996).

The facts as alleged in the complaint are that in November 1992, the Seattle Police Department referred to the King County Prosecuting Attorney's Office a completed investigation report relating to the burglary of a school. Kalina, acting as a Deputy Prosecuting Attorney, reviewed the report and determined that charges should be filed against Fletcher. Pursuant to Washington State criminal procedure, Kalina prepared three pleadings to initiate the prosecution: 1.) an Information charging Fletcher with burglary in the second-degree; 2.) a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of a Warrant and Fixing Bail, and 3.) a Certificate for Determination of Probable Cause, which she personally signed. Kalina prepared the Certificate for Determination of Probable Cause by summarizing the evidence in the completed investigation report. It alleged that Fletcher's fingerprints were found at the crime scene but that he had never been associated with the school. The Certificate also stated that an eyewitness had identified Fletcher as the person who had attempted to sell the property stolen from the school.

Based on these pleadings, the King County Superior Court on December 14, 1992, found probable cause and issued a warrant for Fletcher's arrest. Fletcher was arrested on September 24, 1993, and several weeks later, the prosecutor's office learned that in fact Fletcher had once been an employee at the school where the burglary occurred and that the eyewitness identification had not in fact occurred. Based on this new information, the prosecuting attorney moved to dismiss the charges, and the court granted the motion.

Subsequently, Fletcher filed this action in federal district court. Kalina moved for summary judgment on grounds of absolute immunity. The court denied the motion, and Kalina

filed an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit. That court affirmed the denial of summary judgment, *see Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996), reasoning that Kalina's actions in signing the certificate in support of the arrest warrant were indistinguishable from the actions of the police officer in *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (police officer does not have absolute immunity from a claim that he secured an arrest warrant without probable cause), and that therefore only the qualified immunity available to police officers should apply to Fletcher's claim.

SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to draw clear lines regarding the scope of prosecutorial immunity that are consistent both with the Court's precedents in this context and with the traditional common-law immunities that served as the basis for those decisions. First, the Court should reaffirm what should by now have been apparent: that the common-law defamation privilege justifies an absolute immunity from liability for a prosecutor's presentation of matters to a court in any form, whether by affidavit, as in this case, or by participation in a probable cause hearing, as in *Burns v. Reed*, 500 U.S. 478 (1991). Indeed, this case presents even stronger reasons for recognizing absolute immunity than did *Burns* because the affidavit here was presented to the court at the time of and in connection with the initiation of the prosecution. Second, the Court should clarify for lower courts, prosecutors, and Attorneys General (who often defend claims against prosecutors) that, with rare exceptions, all prosecutorial conduct occurring in connection with and after the initiation of prosecution--i.e., in the "judicial phase" of criminal proceedings--is absolutely immune, except in the unusual case, such as in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), where the conduct has no relation to the presentation of the State's case. Once formal criminal proceedings have begun, it will usually be less difficult to ascertain when a prosecutor is performing a nonprosecutorial function than it might be to make that

determination pre-indictment.

ARGUMENT

I. THE ALLEGEDLY FALSE STATEMENTS CONTAINED IN THE AFFIDAVIT FILED WITH THE COURT ARE SHIELDED BY ABSOLUTE IMMUNITY BECAUSE THEY ARE COVERED BY THE COMMON-LAW DEFAMATION PRIVILEGE FOR STATEMENTS MADE IN JUDICIAL PROCEEDINGS

Just as *Buckley* was "an easy case," *id.* at 2619 (Scalia, J., concurring), for denying absolute prosecutorial immunity because of, among other things, the complete absence of an analogous common-law privilege for acts like fabricating evidence or making out-of-court statements, this case should be an easy one for recognizing absolute immunity: here, the act giving rise to the claim is the statement of allegedly malicious falsehoods in a document presented to a court, conduct that falls squarely within the traditional common-law immunity for allegedly defamatory remarks made by a prosecutor in connection with a judicial proceeding. *See Imbler*, 424 U.S. at 439 (White, J., concurring in the judgment) ("Public prosecutors were . . . absolutely immune at common law from suits for defamatory remarks made during and relevant to a judicial proceeding, and this immunity was also based on the policy of protecting the judicial process.")(citations omitted).

The Court has unequivocally held that this common-law defamation privilege serves as the foundation for absolute prosecutorial immunity against "making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses." *Burns*, 500 U.S. at 489-490 (citations omitted); *see also Buckley*, 113 S. Ct. 2614, 2617; *id.* at 2620 (Scalia, J., concurring)("Insofar as [the false-evidence claims] are based on [the prosecutor's] supposed knowing *use* of fabricated evidence before the grand jury and at

trial--acts which might state a claim for denial of due process--the traditional defamation privilege provides complete protection from suit under § 1983.").

As Justice Scalia explained in his *Burns* concurrence, the common law in existence at the time of the 1871 enactment of the Civil Rights Act afforded an absolute privilege against defamation suits to all statements made during the course of judicial proceedings. *Burns*, 500 U.S. at 501 (Scalia, J., concurring). This privilege extended both to witnesses making the allegedly defamatory statements, thus forming the basis for the absolute witness immunity affirmed in *Briscoe v. LaHue*, 460 U.S. 325 (1983), and to attorneys presenting such evidence. *Burns*, 500 U.S. at 501 (Scalia, J., concurring).

Applying this defamation privilege in *Burns*, the Court was unanimous in granting absolute immunity to a prosecutor's act of eliciting allegedly misleading testimony from a police officer at a hearing on probable cause to issue a search warrant. The Court reasoned that, at common law, prosecutors enjoyed the same absolute immunity as witnesses for statements "related to" a judicial proceeding. *Burns*, 500 U.S. at 489-90; *see also id.* at 490 n.6 (noting widespread recognition in the lower courts and at common law that prosecutors had absolute immunity for presentation of matters to a grand jury).

The application of the defamation privilege to find absolute immunity on the facts of the instant case is just as "easy" as it was in *Burns*. The allegedly false statements that Kalina made were contained in a Certificate for Determination of Probable Cause that was *filed with the court*. It should be beyond question, then, that these allegedly actionable remarks were "made during and relevant to a judicial proceeding." *Imbler*, 424 U.S. at 439 (White, J., concurring in the judgment). Put another way, the statements were "subjected to the 'crucible of judicial process,'" *Burns*, 500 U.S. at 496 (quoting *Imbler*, 424 U.S. at 440 (White, J., concurring in judgment)), and thus inherently safeguarded against the potential for unchecked prosecutorial misconduct. *Butz v. Economou*, 438 U.S. 478, 512 (1978)("[T]he safeguards built into the judicial system tend to

reduce the need for private damages actions as a means of controlling unconstitutional conduct.").

Burns cannot be distinguished on the ground that the prosecutor merely elicited, rather than gave, false testimony, as might be argued here. First, the witness privilege which grounds prosecutorial absolute immunity in this context does not permit such a distinction. Second, the question presented in *Burns*, and the one on which the Court found absolute immunity, involved a charge that the prosecutor "intentionally fail[ed] to fully inform the court" of essential facts, 500 U.S. at 489 (quoting from Petition for Certiorari in that case), in the course of exercising the his prosecutorial "sole and exclusive power to seek a search warrant or approve the seeking of a search warrant." 500 U.S. at 491 n.7. In other words, in *Burns*, the prosecutor was making representations to the court just as Kalina was when she certified facts in a completed written investigation.

To summarize, this Court's interpretive approach to absolute immunity, which has looked to the scope of the common-law immunities that the Congress enacting the Civil Rights Act of 1871 would presumably have been aware of, compels the conclusion that a prosecutor has absolute immunity for matters presented to a court. Policy concerns also lead to this conclusion, as discussed below.

II. CONCERNS FOR PROTECTING THE INTEGRITY OF THE JUDICIAL PROCESS WEIGH IN FAVOR OF ABSOLUTE IMMUNITY BECAUSE THE FILING OF THE AFFIDAVIT OCCURRED SIMULTANEOUSLY WITH AND AS A PART OF THE FILING OF CRIMINAL CHARGES

In addition to the close analogy of common-law defamation immunity, the *Burns* Court held that the "policy of protecting the judicial process," 500 U.S. at 492, which was central to *Imbler*, dictated a rule of absolute immunity for the prosecutor's

presentation of evidence to the court in the hearing on the search warrant. Despite the fact that the criminal defendant in *Burns* was not charged with a crime until well after the probable cause hearing and search, the Court nonetheless considered the eliciting of allegedly false testimony at that hearing to be "intimately associated with the judicial phase of the criminal process." *Id.* (quoting *Imbler*). Similarly, the lack of any effect on the integrity of the judicial process underlay the Court's decision not to grant absolute immunity to the prosecutor's legal advice, which was given to the police in the midst of an ongoing investigation. *Id.* at 494 ("Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.")(citations omitted)(emphasis in original). In providing advice on the legality of using hypnosis as an investigative technique, the prosecutor was both far removed from the courtroom, and therefore unrestrained by concern that his act would be "subjected to the 'crucible of judicial process,'" *Burns*, 500 U.S. at 496 (quoting *Imbler*, 424 U.S. at 440 (White, J., concurring in judgment)), and was acting in an administrative or investigative capacity at a phase of the case remote from a decision to charge or judicial proceedings. *Burns*, 500 U.S. at 493.

The consistent policy embodied in *Imbler*, *Burns*, and *Buckley* has been to protect the judicial process from the dysfunction and distortion that would result from key actors--witnesses and prosecutors--fearing for their personal liability. This policy has led the Court to protect prosecutors when acting 1.) before the bar of the court, where the prosecutor invariably appears as an advocate for the State, even if appearing during the investigative phase of the case, as in probable cause hearings or grand jury proceedings; or 2.) after the investigation is completed and the prosecutor's acts are advancing the ultimate goal of securing a prosecution; or 3.) both of the above. The facts in this case fall into category 3.), where both conditions are present. First, Kalina filed her Certificate for Determination of

Probable Cause *with the court* at the same time and in the same "package" of pleadings containing the Information charging Respondent with a criminal offense. Second, she prepared her Certificate for Determination of Probable Cause based on *a completed written investigation report*. There is nothing to support any inference that her acts occurred during the investigation. The certification she signed and filed could hardly be more intimately associated with the judicial process, as that concept has been applied in the Court's cases.

III. ABSENT EXTRAORDINARY CIRCUMSTANCES, PROSECUTORIAL CONDUCT OCCURRING AT THE TIME OF OR AFTER THE FILING OF CRIMINAL CHARGES IS A PROSECUTORIAL FUNCTION AND ABSOLUTELY IMMUNE

The Ninth Circuit's misreading of this Court's precedents points to a larger problem, which the Court now has an auspicious occasion to remedy: the Court's absolute immunity cases, while embodying sound and workable principles, have lent themselves to unprincipled *ad hoc* narrowing by the lower courts. Any test without greater certainty of application significantly frustrates the aims of ensuring prosecutors the independence of judgment and freedom from diverting, vexatious litigation that *Imbler* understood to be so essential.

The nation's judicial systems would be well served by a ruling that firmly established absolute prosecutorial immunity for virtually all conduct in connection with a criminal case that occurs as part of or after the filing of criminal charges. Once charges have been filed, the prosecutor, acting as a prosecutor, has the singular mission of proving the charges and securing a conviction, unless justice dictates changing course. That being so, it should generally be easier to identify and check, once the judicial proceedings are underway, instances when a prosecutor departs altogether from the prosecutorial function. For example, in *Buckley*, the Court readily concluded that the prosecutor's extrajudicial comments to the media in a press conference had

"no functional tie to the judicial process just because they are made by a prosecutor." *Buckley*, 113 S. Ct. at 2618.

A holding that presumed absolute prosecutorial immunity for conduct during and following the filing of criminal charges would provide a helpful temporal demarcation similar to the one apparently established in *Buckley*, where the Court suggested that conduct occurring before probable cause exists can never be a prosecutorial function. *See Buckley*, 113 S.Ct. at 2616 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested"); *but see id.* at 2622-23 (Kennedy, J., dissenting) (noting anomalies created by drawing such an fixed line against the availability of absolute immunity). Just as the times when a prosecutor acts as an advocate before having probable cause to arrest may be rare or nonexistent, it would be the similarly rare case when, post-indictment, a prosecutor acts towards the indicted criminal defendant in ways that do not relate to the prosecutorial function. Such extra-judicial prosecutorial acts, such as the out-of-court statements in *Buckley*, are easily avoided by prosecutors or, if not, identified by courts as not deserving of absolute immunity.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief of the Petitioner and her other supporting *amici*, this Court should recognize the Petitioner's absolute immunity from the claim in this case and reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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